UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DISABILITY RIGHTS FLORIDA, Inc.,
a Florida non-profit corporation,

Plaintiffs,

v. **CASE NO.: 4:11-CV-116-RS-CAS**

ELIZABETH DUDEK in her official capacity as Secretary of the Florida Agency for Health Care Administration, and **MIKE HANSEN** in his official capacity as Director of the Florida Agency for Persons with Disabilities,

Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, Disability Rights Florida, Inc., d/b/a Disability Rights Florida, by and through the undersigned counsel, files this Response to Defendants' Motion to Dismiss. (Doc. No. 139). In opposition thereto, the Plaintiff submits the following response and memorandum of law.

1. Disability Rights Florida, Florida's Protection and Advocacy System ("P&A"), is charged with protecting "the legal and human rights of individuals with developmental disabilities." 42 U.S.C. § 15001(b)(2).

2. The P&A filed this suit against the agency heads for the Agency for Persons with Disabilities ("APD") and the Agency for Health Care Administration ("AHCA"), for rights violations in their operation of the Medicaid Waiver for Persons with Developmental Disabilities ("DD Waiver").

3. United States Supreme Court and Eleventh Circuit precedent demonstrates the P&A has the authority to seek legal remedies for rights violations on behalf of those it is mandated to protect.

4. The Defendants' future and on-going harms to the P&A's constituents meet the requirements for associational standing; there is no requirement to name the names of individual constituents of the P&A to overcome a facial attack on standing.

5. The Defendants' assertion that the P&A must abandon all other avenues for redress but one when multiple viable avenues are present is unsupported; zealous advocacy requires otherwise. *See International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288-89 (1986) (argument that association's members "who wish to litigate common questions of law or fact against the same defendant be permitted to proceed only pursuant to the class-action provisions" fell "far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing").

6. For these reasons and those contained in the Plaintiff's Memorandum of Law below, the Defendants' motion should be denied.

MEMORANDUM OF LAW

I. PLEADING STANDARDS

Defendants assert three arguments to challenge the P&A's standing and this Court's subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rule of Civil Procedure. First, the P&A has not demonstrated that its members would otherwise have standing to sue in their own right. Second, the claims asserted and relief requested

requires participation of other named individuals. Finally, if the P&A had standing, its claims are now moot. None of the Defendants' challenges can be sustained.

Motions to dismiss for lack of subject matter jurisdiction come in two forms — facial and factual. A facial attack does not rely on information outside of the complaint; the Defendants' motion refers to alleged deficits in the P&A's Amended Complaint and is, therefore, a facial attack. "A 'facial attack' ... requires the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F. 2d 1525, 1528-29 (11th Cir.1990).

Standing doctrine is concerned with "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, and it is presumed that those allegations embrace the facts necessary to support them. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Also, "Article III standing must be determined as of the time at which the plaintiff's complaint is filed." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180, 120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000)) (emphasis added).

II. STANDING, GENERALLY

Article III of the United States Constitution requires a case or controversy for the federal court to decide. *Id.* This requirement is met when there is an injury-in-fact that is

traceable to the actions or inactions of the Defendants which is likely to be remedied by an order of the court granting the requested relief. *Lujan,* 504 U.S. at 560-61. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition to the presumption of truth, one or both of the Defendants have admitted the following allegations from the P&A's Amended Complaint:

- For at least the past five years, only those persons deemed to be in crisis[1] were enrolled on the DD Waiver; (*Compare* Doc. 30, ¶9 *with* Doc. 62, ¶9).
- There are over 19,000 individuals, both children and adults on the DD Waivers waitlist; (*Compare* Doc. 30, ¶139 *with* Doc. 62, ¶139).
- As of July 2010, APD reported that 37.2% of those on the waitlist had been waiting for community services longer than five years and 12.2% had been waiting for four to five years; (*Compare* Doc. 30, ¶142 *with* Doc. 62, ¶142).
- As of February 2011, 16% of those persons registered for the waitlist (approx.. 3,140) were categorized by APD as Category Three[2]; (*Compare* Doc. 30, ¶143 *with* Doc. 62, ¶143).
- At present, there are approximately 198 persons with developmental disabilities residing in private ICF/DDs (intermediate care facilities for the developmentally disabled) who are registered on the DD Waivers waitlist; (*Compare* Doc. 30, ¶153 *with* Doc. 62, ¶153).
- Additionally, 69 persons with developmental disabilities registered for the DD Waivers waitlist reside in state-run ICF/DDs. (*Compare* Doc. 30, ¶155 *with* Doc. 62, ¶155).

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[1] "Crisis" is defined by Rule 65G-1.047 of the Florida Administrative Code to mean those who are homeless, a behavioral threat to themselves or others, and without a caregiver.

[2] Category 3 includes, but is not limited to, those for whom their caregivers are "expected" to be unable to provide care within the next 12 months and those who are identified by a facility as ready for discharge from a state mental health hospital, intermediate care facility for the developmentally disabled, a skilled nursing facility, correctional facility, or a secure forensic facility within the next 12 months. § 393.065(5), Fla. Stat. & Fla. Admin. Code R. 65G-11.002.

Not everyone can be on the DD Waiver waitlist. APD first receives a written application, then reviews documentation alleging a qualifying developmental disability, pursuant to Florida Statutes § 393.063(9). *See also* Fla. Admin. Code R. 65G-4.014. APD must provide a comprehensive assessment to definitively identify individual conditions or needs, and gives the applicant hearing rights if the eligibility determination is adverse. APD has already found that the individuals named in the First Amended Complaint were eligible to receive community services through the DD Waiver and, at the time of filing, the named individuals remained on the Defendants' waitlist subject to the policies and rules challenged in the First Amended Complaint.

III. ASSOCIATIONAL STANDING

A. STANDARD

An association can sue on behalf of its members when three things occur: (1) Its members would have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose[3]; and (3) neither the claim nor relief requested require the participation of individual members. *Hunt v. Washington State Apple Comm'n*, 432 U.S. 333 (1977).

In *Doe v. Stincer,* the Eleventh Circuit stated: "It is enough for the representative entity to allege that one of its members or constituents has suffered an injury that would allow it to bring suit in its own right." 175 F. 3d 879, 884-85 (11th Cir. 1999) (internal citations omitted). The Defendants' position that a P&A's constituent must be named or

[3] This element was not contested and is therefore not discussed herein. Nonetheless, pursuant to 42 U.S.C. § 15043, the relief sought and claims asserted in this matter are germane to the P&A's purpose.

identified is contrary to the Eleventh Circuit holdings. *See id.* (no need for an "explicit statement of representation"); *see also Church of Scientology v. Cazares*, 638 F. 2d 1272, 1279 (1981)[4] (neither unusual circumstances, inability of individual members to assert rights nor an explicit statement of representation are requisites). The Eleventh Circuit looks for a close nexus between the organization and its members on one side and the alleged injury as a result of Defendant's conduct on the other. *Stincer,* 175 F. 3d at 884-85.

The nexus here is between the Defendants' rules and policies in operating the DD Waiver, its enrollment, and the waitlist, and the effect of those rules and policies on the P&A's constituents—persons with developmental disabilities who are DD Waiver eligible. The P&A has alleged, and Defendants have admitted in part, that there is a finite number of constituents waiting for DD Waiver services and residing in institutionalized settings—private ICF/DDs, state-operated institutions, and nursing homes. (Doc. No. 30, ¶¶ 153-155 & 157). Yet, the Defendants' agencies' rules and policies only allow persons in crisis to obtain community services; persons in institutions don't meet "crisis" pursuant to rule. (Doc. No. 30, ¶¶ 7, 9, 21, 24, 30, 33, 37, 40, 141, & 144). Constituents in community settings wait for services for exorbitant amounts of time, suffering the regression of skills and abilities, while the Defendants refuse to enroll individuals up to the federally approved intended recipient count. (Doc. No. 30, ¶¶ 49, 51, 57, 63, 65, 70). The P&A's constituents desire and wait for community services, but the Defendants'

[4] *See Bonner v. Prichard*, 661 F. 2d 1206, 1209 (11th Cir.1981) (*en banc*) (adopting as binding precedent in the Eleventh Circuit, all decisions of the former Fifth Circuit announced prior to October 1, 1981).

policies preclude enrollment of the vast majority who are waiting. Because the Defendants' conduct and omissions pertains to the P&A's constituents and their injuries, a nexus exists.

The United States Supreme Court has affirmed the P&A's ability to pursue litigation to vindicate the rights of those it protects. *See Virginia Office for Prot. & Advocacy v. Stewart*, __ U.S. ___, 131 S. Ct. 1632 (2011) (Virginia P&A filed suit pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15043 (DD Act)). The Court stated, "in addition to pressing its own rights, a P & A system may 'pursue administrative, legal, and other remedies on behalf of' those it protects." *Stewart,* 131 S.Ct. at 1636; *see also* 42 U.S.C. § 15044(b). The P&A specifically alleged its claims according to its authority, found within 42 U.S.C. § 15043(a)(2)(A)(i), on behalf of itself and the individuals it was charged with protecting "as clients and potential clients who are on the DD Waivers waitlist are not receiving needed services until they transition onto the DD Waivers." (Doc. No. 30, ¶ 88).

The Eleventh Circuit has already recognized this P&A's associational standing in *Stincer*, where the P&A filed suit pursuant to its authority in the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), 42 U.S.C. § 10801,[5] seeking redress for

[5]Congress intended that the authorities under the DD Act, the *Protection and Advocacy for Individuals with Mental Illness Act*, 42 U.S.C. §§ 10801 *et seq*. ("PAIMI"), and the *Protection and Advocacy of Individual Rights Program of the Rehabilitation Act*, 29 U.S.C. § 794e ("PAIR"), be applied in a consistent manner. *See, e.g.,* S. Rep. 109, 99th Cong., 1st Sess. 3 (1986); S. Rep. 113, 100th Cong., 1st Sess. 24 (1987); S. Rep. 357, S. Rep. 454, 100th Cong., 2nd Sess. 10 (1988); 102nd Cong. 2nd Sess. 100 (1992); 29 U.S.C. § 794e; & *Alabama Disabilities Advocacy Program v. J.S. Tarwater Devtl. Ctr.*, 894 F. Supp. 424, 427 (M.D. Ala. 1995), *aff'd*, 97 F.3d 492 (11th Cir. 1996).

the effect a state statute had on obtaining records for constituents who had sought mental health therapy. 175 F. 3d at 883. The court likened the plaintiff P&A to the plaintiffs in *Hunt*, as both plaintiffs were designated by the government to protect a specific segment of society. *Id.* at 886. The court further found that the P&A's multi-member governing board, advisory council, opportunity for public comment on its priorities and activities, and grievance system resembled a traditional membership organization. *Id.*

Pursuant to the DD Act asserted in this matter, this P&A is a non-profit entity with a multi-member governing Board of Directors. (Doc. No. 11). The majority of the board includes "individuals with disabilities, including individuals with developmental disabilities, who are eligible for services, or have received or are receiving services through the system" or "parents, family members, guardians, advocates, or authorized representatives of individuals referred to in clause." 42 U.S.C. § 15044(a)(1)(B)(i)&(ii). As such, this P&A's multi-member governing Board of Directors specifically nullifies the necessity of an advisory council. *See* 42 U.S.C. § 15044(a); 45 C.F.R. § 1386.21(g). The P&A provides to the "public, including individuals with developmental disabilities attributable to either physical impairment, mental impairment, or a combination of physical and mental impairment, and their representatives, and as appropriate, non-State agency representatives of the State Councils on Developmental Disabilities, and Centers, in the State" an opportunity to comment on the P&A's goals and priorities, including the basis rationales as well as the activities of the system. 42 U.S.C. § 15043(a)(2)(D). In so doing, the P&A must provide broad distribution of its proposed priorities and objectives "in a manner accessible to individuals with developmental disabilities and their

representatives." 45 C.F.R. § 1386.23(d)(2). The P&A also provides a grievance system for clients and potential clients to ensure full access to the services of the system. 42 U.S.C. § 15043(a)(2)(E).

Historically, litigation has been recognized as a crucial tool for the P&A to protect against and remedy discriminatory violations of those it was charged with protecting. *See, e.g., Naughton v. Bevilacqua*, 458 F. Supp. 610, 616 (D.R.I. 1978), *aff'd*, 605 F. 2d 586 (1st Cir. 1979) ("The enforcement of individual rights, however, cannot be achieved solely by withholding federal funds; not only is the Secretary incapable of investigating every violation, but the Secretary may quite properly be unwilling to withhold funds for a single violation. Thus, the advocacy agency and a private right of action are crucial to protect the rights secured by the Act."). "To ensure such protection, the P&A System is given the express authority to 'pursue legal, administrative, and other appropriate remedies' to guarantee protection of, and advocacy for, the rights of the developmentally disabled individuals within the State." *Hawaii Disability Rights Ctr. v. Cheung*, 513 F. Supp. 2d 1185, 1194 (D. Haw. 2007).

a. The P&A's Constituents Would Have Standing to Sue in Their Own Right

i. Injury to Constituents

The injury must be both "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Florida Wildlife Fed'n., Inc. v. South Fla. Water Mgmt. Dist.,* 647 F. 3d 1296 (11th Cir.2011). The concept of "imminence" should "advance the purposes behind the case-or-controversy requirement of Article III." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F. 3d 1153, 1161 (11th Cir.

2008). In application, imminence should ensure that actual adversity exists, the courts' powers are limited, and judicial resources are preserved. *Id*. The Defendants take issue that another "*actual person*" has not been described in the Amended Complaint. (Doc. No. 139, at 8). However, there is no case law supporting such a pre-requisite for a facial attack on an association's standing. The alleged need for an "actual person" countervails Defendants' supplemental argument that the named individuals must be absent.

There is adversity between these parties, as the P&A is designated to confront adverse policies, specifically with litigation such as this. 42 U.S.C. § 15043. Reservation of this Court's resources is furthered by litigating pervasive and systemic violations rather than individual lawsuits for each of the 198 individuals waiting in ICF/DDs for community services, who could have been listed as Doe 1-198. The 69 individuals waiting for community services in state-run developmental institutions, the 115 individuals waiting for community services in nursing homes, and the 3,140 individuals categorized as expected to be without a caregiver within the next twelve months that are waiting for community services could similarly be listed as Does 199-3522, but it is not necessary to "to name a specific individual in order to have standing to sue." *Stincer*, 175 F. 3d at 884. Therefore, the P&A has identified concrete and particularized injuries that are actual for institutionalized P&A members and imminent for those residing in the community, at minimum for those in Category 3. Constituents who are on the waitlist, eligible for the DD Waivers and seeking community services without receiving them, they meet the criteria for the P&A's mandate to protect the legal and human rights of those with developmental disabilities. *See* 42 U.S.C. § 15001.

In *National Alliance for Mentally Ill, St. Johns Inc. v. Board of County Comm'rs of St. Johns County*, 376 F. 3d 1292, 1296 (11th Cir. 2004), the Eleventh Circuit found that the plaintiff organization did not establish their standing at the stage of dispositive motions. The district court's order (M.D. Fla., Case No. 3:01-cv-01070-UA, Doc. No. 118, at 52) found that the organizational plaintiff did not identify a constituent with a concrete injury when they had the chance to do so by overlaying the statutory criteria with their membership records to demonstrate an injured constituent. However, the Eleventh Circuit clarified *Nat'l Alliance* by distinguishing the burden necessary when the allegation is of future injury, as opposed to past injury. In *Browning*, the Eleventh Circuit stated that when claims are based on injuries allegedly caused by the defendant's past violations, the organization should be able to name an actually injured constituent. *Id.,* 522 F. 3d at 1160. The court then clarified that "[w]hen the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future." *Id.* As the Defendants continue their waitlist categorizations and crisis-only enrollments, constituents with qualifying disabilities will continue to be denied DD Waiver services despite their selection for community services over institutionalization.

Therefore, the Defendants' assertions that an individual constituent be named and his/her specific injury described are erroneous. Nonetheless, the First Amended Complaint describes those individuals and injuries. (Doc. No. 30, ¶¶ 1-6, 153, 154, 155, 156, 157, 176, & 177). The Defendants' conduct "limits the number of crisis enrollments to only those that could be served with funding saved through attrition." (Doc. No. 30, ¶

10). The Defendants' conduct forces persons to forgo services completely while waiting for the dangerous hold of crisis to set in. (Doc. No. 30, ¶ 11). Others will never be enrolled because they will never meet the Defendants' description of "crisis." (Doc. No. 30, ¶ 12). Meanwhile, the number of waitlisted persons residing in ICF/DDs has increased in recent years. (Doc. No. 30, ¶ 29). Persons on the waitlist languish for years without DD Waiver services that meet their needs in the most integrated setting possible. (Doc. No. 30, ¶ 158). The Defendants failed to provide the necessary choice counseling to ICF/DD residents to determine whether an integrated setting is more appropriate for them. (Doc. No. 30, ¶ 191). The Defendants do not routinely identify ICF/DD residents who can live in the community and desire to do so. (Doc. No. 30, ¶ 192). The Defendants have failed to identify all DD Waiver eligible persons that have been diverted to nursing homes, and to routinely and continuously offer choice counseling to them to ensure the most integrated setting. (Doc. No. 30, ¶ 196). These are concrete and particularized harms to those waiting for services in institutional settings and those seeking enrollment from community settings. More importantly, these allegations plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft*, 556 U.S. at 678.

In *Cazares*, the former Fifth Circuit Court of Appeals found the pleadings sufficient to confer associational standing on behalf of the Church members when the complaint alleged: the nature of the church's services to its members; that it owned property utilized by its members to effectuate their freedom of religion; and that the city officials "inflamed public sentiment against the Church and its members and induced other churches and civic associations to shun association with the Church and its

members." *Id.*, 638 F. 2d at 1279. This was sufficient to establish the nexus between the Church of Scientology and its members to confer associational standing. The court further found insufficient the argument that the complaint "did not specifically state that the Church was seeking to represent its members in the action." *Id.* at 1277. The Fifth Circuit stated, "[w]e are unaware of any authority that requires such an explicit statement." *Id.*

The Defendants' reliance on *Access 4 All, Inc. v. Trump Int'l Hotel & Tower Condo*., 458 F. Supp. 2d 160 (S.D.N.Y. 2006) is misplaced. That case involved an ADA physical accessibility issue pursuant to Title III, not Title II. *Id.* at 163. The Court found that the plaintiff association and the individually named plaintiff had identical claims; based on the prudential standing doctrine of allowing the best plaintiff to assert the claims, the court found that the association plaintiff should be dismissed because the individually named plaintiff was better suited to advance his arguments for the ADA violation. *Id.* The Defendants' *Access 4 All v. Trump* assertions are contradictory. They claim the specific constituents of the P&A must be absent to invoke associational standing, while also asserting that the lack of a specifically-named P&A constituent is deficient for associational standing.

Nonetheless, the P&A has asserted that there are indeed specific constituents who are absent and that it filed this lawsuit on their behalf. Specifically, the P&A and the Defendants agree on the number of individuals residing in privately operated ICF/DDs and state-run developmental centers. Additionally, the P&A has asserted the number of institutionalized individuals waiting for services in skilled nursing facilities. The P&A

has also asserted the numbers of other individuals at risk of institutionalization while waiting for community services, including 3,140 individuals that the Defendants expect to be without their current caregivers within the next twelve months. Therefore, the P&A's First Amended Complaint contains the "plausible grounds to infer" to survive the Defendant's motion. *Watts v. Florida Int'l Univ.*, 495 F. 3d 1289, 1295 (11th Cir. 2007) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

Pointedly, the court in *Access 4 All v. Trump* stated that the organization could have produced evidence from multiple members that discussed different ADA violations at the hotel thereby allowing them to sue "on the cumulative violations, regardless of whether any individual member experienced all the violations." *Id.*, 458 F. Supp. 2d at 175. The plaintiff organization had solely relied on the individually named plaintiff's affidavit to support its claim for standing on all alleged ADA violations. *Id.* In that case, the individually named plaintiff had no knowledge of and did not encounter all 31 alleged accessibility Title III violations of the ADA Accessibility Guidelines. *Id.* at 174. The court reasoned that a person with a visual impairment could not sue for someone with an audiological impairment by reason that "where the alleged violation does not affect a plaintiff's disability, that plaintiff is not injured and therefore has no standing to bring suit." *Id*. *Access 4 All v. Trump* is inapposite to the allegations in the instant matter. The P&A constituents harmed by the Defendants are those persons with developmental disabilities. The Defendants' methods of administering the DD Waiver denies community services to the P&A's constituents and does not contradict the reasoning described in the New York case relied upon by Defendants.

Given the former Fifth Circuit's holding in *Cazares* and related case law, and the Defendants' concession that the Amended Complaint "identifies injuries potentially sufficient to confer standing" (Doc. No. 139, at 6), the P&A's constituents have standing to sue in their own right as pled by the P&A in its Amended Complaint.

ii. Fairly Traceable to Defendants' Acts and Omissions

In the Northern District Court of Florida, a causal connection between the Defendants and the injury that is clear and concise is in need of no further affidavits to support the claim. In *Self-Ins. Inst. of Am. v. Gallagher,* 11 Employee Benefits Cas. 2162, 1989 WL 143288 (N.D. Fla. 1989), *aff'd sub nom., Self-Ins. Inst. v. Gallagher*, 909 F.2d 1491 (11th Cir. 1990), the court analogized to *Hunt* and reasoned that "the requirements of the state statute so clearly impinged upon the activities of the Washington growers and shippers that the Court was satisfied that real injury existed without a showing that any particular grower had been subjected to the coercive or penal effects of the North Carolina law." *Id.* at *6. (emphasis added). The court in *Gallagher,* found that the harm there was even more immediate than in *Hunt. Id.* at *7. The apple growers in *Hunt* alleged that their future action of shipping apples to North Carolina would subject them to the challenged state statute; the *Gallagher* plaintiffs were already performing acts in Florida pursuant to their employee benefits plan. *Id.* Likewise, some P&A constituents are institutionalized while waiting for DD Waiver services and nearly all are categorically denied DD Waiver services by the Defendants' crisis-only enrollment policies.

iii. Likely to be Redressed by a Favorable Ruling by This Court

Finally the injury must be able to be redressed by a favorable ruling of the court. In *Warth,* the Supreme Court noted that an organization's standing is determined in *"substantial measure"* by the relief sought. *Warth,* 422 U.S. 490 at 515. When the relief requested is a declaration and prospective relief it is reasonable that the remedy would inure to the benefits of the organization's members. *Id.* at 515. For violations of the ADA, courts have held that allegations "giving rise to an inference that he will suffer future discrimination by the defendant" are sufficient for standing to seek injunctive relief. *Shotz v. Cates*, 256 F. 3d 1077, 1081 (11th Cir. 2001). The future harm must not be conjectural or hypothetical. *Id.* Much like the Psychology candidate in *Shaywitz v. American Bd. of Psychiatry & Neurology*, 675 F. Supp. 2d 376, 383 (S.D.N.Y. 2009), there is a reasonable inference that the P&A constituents would be seeking enrollment to the DD Waiver, whether they currently live in institutions or not, to receive services if they did not think it was futile based on the Defendants' challenged practices and policies.

b. Individual Participants are Unnecessary as to the Claim and Relief Sought

The third *Hunt* requirement was later determined to be prudential in *United Food & Commercial Workers Union v. Brown Group Inc.*, 517 U.S. 544 (1996). Because the P&A is seeking declaratory and injunctive relief regarding the Defendants' policies and processes for administering the DD Waiver, sample testimony without the need for individual participation is all that is necessary.

In 2010, the Eleventh Circuit affirmed a lower court's finding of associational standing for a group of medical providers. *Borrero v. United Healthcare of N.Y., Inc.,*

610 F. 3d 1296, 1306 (11th Cir. 2010). In *Borrero,* the medical providers did not seek associational standing in federal court and were instead challenging removal of the action from state to federal court. *Id.* at 1305. The Eleventh Circuit, however, held that because the association plaintiff had sought declaratory and prospective relief the federal court had jurisdiction over their claims. *Id.* at 1306. The court specifically looked to their complaint and found that they had sought relief "to vindicate the rights of the associations and their members" and "that the purposes of the associations encompass ensuring appropriate service-payment transactions between providers and insurers." *Id.* at 1305. Further, the court analogized the case to *Pennsylvania Psychiatric Soc. v. Green Spring Health Servs., Inc*., 280 F. 3d 278 (3d Cir. 2002) where "[B]ecause the society challenged the methods of the managed care organizations, and not specific decisions made by the organizations, its case could be proved by sample testimony." *Id*. at 1306. Such is the case here. The P&A challenges, on behalf of its constituents, the Defendants' (1) refusal to enroll persons up to their federally approved amount of intended recipients, (2) their application of 'crisis-only' enrollments, and (3) the resulting life sentence of those waiting for services in institutional settings. These agency policies, practices and rules prevent persons on the waitlist from accessing community services in a reasonably prompt manner, effectively deny them the choice of community services, deny them the ability to make an informed choice without knowing their placement in Defendants' waitlist categories and continue the unnecessary institutionalization of those waiting for services in inappropriate restrictive settings.

Claims that "a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court" while at the same time leaving the individual eligibility determinations of those benefit programs to the state administrative agencies to decide. *Brock,* 477 U.S. at 285. In *Brock*, the court decided the claims and relief did not require the trial court to consider the individual circumstances of any aggrieved union member; instead, the suit presented a pure question of law concerning the interpretation of the Trade Acts' eligibility provisions. *Id,* at 287. The Court found "the unique facts of each UAW member's claim will have to be considered by the proper state authorities before any member will be able to receive the benefits allegedly due him, the UAW can litigate this case without the participation of those individual claimants and still ensure that 'the remedy, if granted, will inure to the benefit of those members of the association actually injured,'" *Id*. at 288 (*quoting Warth*, 422 U.S. at 515).

Indeed, Florida courts have recognized the exception to this prudential concern when the case presents a pure question of law. *Minor I Doe ex rel. Parent I Doe v. School Bd. for Santa Rosa County, Fla.*, 264 F.R.D. 670, 688 (N.D. Fla. 2010). Again, this lawsuit involves the determination of the validity of the Defendants' refusal to: enroll individuals up to the federally approved intended recipient amount; abdicate the enforcement of 'crisis-only' enrollments, especially when it comes to those residing in institutional settings; and provide notice of the assigned waitlist category to each individual to effectuate an informed decision in choosing between services that take decades to materialize while their skills regress or immediate institutional services.

Not only is the instant matter a question of law pertaining to the Defendants' policies and rules named herein, but the P&A is not required to name specific individuals whose rights under the ADA have been violated. "The Eleventh Circuit has recognized that the Hunt requirements are the 'sole' requirements for associational standing and that an association is not required to 'name the members on whose behalf suit is brought.'" *Harrell v. The Florida Bar*, 2008 WL 596086 (M.D. Fla.) (*quoting Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir.1999)). *See also In re Managed Care Litig*., 298 F. Supp. 2d 1259, 1308 (S.D. Fla. 2003) (the "absence" of any individual plaintiff member from the organization is not required to be joined by the organization for associational standing on behalf of its members to bring a valid claim).

The Southern District Court of Florida has dismissed the argument that ADA claims cannot be brought by associations representing their interests because the result robs those organizations of the ability to advance their interests collectively. "In essence, the argument asserted …that associational standing cannot exist because ADA claims require individualized proof-would require that no organization advocating for ADA compliance could ever obtain standing." *Access 4 All, Inc. v. L & D Investors Sunrise, Inc.*, 24 A.D. Cases 638, 2011 WL 69848, *2 (S.D. Fla. 2011). The reasoning relied upon Congressional intent, "especially in light of the Eleventh Circuit's decision in *Stincer* and its prior decision not to sua sponte raise associational standing in this context, *see American Disability Ass'n v. Chmielarz*, 289 F. 3d 1315 (11th Cir. 2002) (granting attorneys fees to an associational plaintiff pursuant to the ADA, but not raising standing concerns)." *Id.* The case law cited by Defendants, *Concerned Parents To Save Dreher*

Park Ctr. v. City of W. Palm Beach, 884 F. Supp. 487 (S.D. Fla. 1994), predates and is supplanted by both the *Stincer* and *Access 4 All v. L & D Investors Sunrise* decisions.

"Prudential barriers do not, however, apply in all cases as 'Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.'" *Equal Access For All, Inc. v. Hughes Resort, Inc.*, 504CV178MCR, 2005 WL 2001740, at *4 (N.D. Fla., Aug. 10, 2005) (*citing* *Warth*, 422 U.S. at 501). Here, Congress has given the P&A a mandate to pursue litigation to redress rights violations. 42 U.S.C. § 15043(a)(1)(A)(i). The claims made in the P&A's First Amended Complaint consist of violations of the P&A's constituents' rights, based on the Defendants' methods for managing the DD Waiver waitlist, its application of crisis-only enrollments, refusal to enroll up to the federally approved intended recipient count, and denial of waitlist categorization status to those waiting to make an informed choice of the delivery of services in the community or in an institution. The instant matter is much more akin to *Borrero* and *Brock* than any case the Defendants have cited and therefore does not require named individuals as Plaintiffs.

B. CAPABLE OF REPETITION YET EVADING REVIEW

The Eleventh Circuit requires two showings to qualify a matter as capable of repetition yet evading review. First, the challenged action is too short in duration to be fully litigated prior to its cessation or termination. Secondly, there is a reasonable expectation that the same complaining party will be subject to the same action again. *Florida Farmworkers Council, Inc. v. Marshall*, 710 F. 2d 721, 731 (11th Cir. 1983). Here, the complaining parties are the P&A's constituents, on whose behalf the P&A

seeks associational standing. Class certification and associational standing have the same purpose and the notion that an association can only remedy its members' injuries through class certification is erroneous. *Brock* at 289. The P&A seeks declaratory and injunctive relief as to the Defendant's policies and rules implementing the DD Waiver program in opposition to federal statutes.

In *Mississippi Prot. & Advocacy Sys., Inc. v. Cotten*, 929 F. 2d 1054, 1057 (5th Cir. 1991) the court found that, where the defendants resolved the sole individually named plaintiff's claim, the plaintiff could continue as class representative because the allegations would continue and escape judicial review. The matter involved access by the P&A's attorneys to mentally ill constituents in jail. *Id.* at 1056. The defendants contended that once the individually named plaintiff obtained counsel, the matter was moot and the named plaintiff lacked standing. *Id.* at 1057. However, the court held that "[t]aking defendant's theory to its logical conclusion, no patient-if represented by counsel-could ever have standing to litigate this matter in a federal forum." *Id*. Therefore, the reasoning in *Cotten* mirrors the instant matter and is in accord with the congressional mandate to the P&A to redress rights violations of persons with developmental disabilities.

"[W]hen the threatened acts that will cause injury are authorized or part of a policy, it is significantly more likely that the injury will occur again." *31 Foster Children v. Bush*, 329 F. 3d 1255, 1266 (11th Cir. 2003). Much like the plaintiffs in *31 Foster Children*, the P&A's constituents cannot avoid exposure to the defendants' challenged conduct. *Id.* at 1266. They seek services in community settings, but cannot obtain them without the approval of the Defendants.

The allegations of rights violations in the instant matter are more similar to the governmental policies at issue in *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) in which the challenged governmental activity was "not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." The Defendants' policies are fixed and definite; they have not ceased just because they offered relief to the six named individuals. In fact, one Plaintiff died before transitioning in accordance with his choice of community services over institutionalization. This case embodies the "important ingredient" in such cases – "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society."

Likewise, the P&A's constituents who are at risk of institutionalization involuntarily go without services and cannot avoid future exposure to the Defendant's policies of limiting the number of recipients for community-based services, crisis-only enrollments, and waitlist prioritization categories. Pivinski and Woodward continue to be subject to the challenged rules and policies of the Defendants. Constituents that reside in skilled nursing facilities, like Young, continue to be subjected to unnecessary institutionalization without a means to obtain services through the DD Waiver. They will never be considered as crisis enrollees because of their current living arrangements and will be subject to the waitlist prioritization categories, forever stuck in Category Three. Finally, the P&A's constituents in ICF/DDs waiting for community-based services continue to be subject to the policies and omissions that have kept them there. They have not been moved, nor have the Defendants developed a comprehensive and effective plan

to transition them to community services. Without this Court's injunctive relief, they remain subject to the Defendants' slow haphazard hand.

Defendants claim voluntary cessation as grounds to dismiss this action. However, "'A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.' (emphasis added). A burden-shifting provision accompanies this stringent standard." *Smith ex rel. Smith v. Bension*, 22 Fla. L. Weekly Fed. D 117 (S.D. Fla. 2009) (quoting *Friends of Earth, Inc.,* 528 U.S. 167 ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.")) (internal citations omitted). Yet, the Defendants do not state how their policies and rules of freezing institutionalized persons in a waitlist category, refusing to enroll individuals up to the federally approved intended recipient count, and limiting enrollments to only those persons in crisis has been "unambiguously terminated." *Troiano v. Supervisor of Elections*, 382 F. 3d 1276, 1281–82 (11th Cir. 2004) Therefore, the Defendants' argument of voluntary cessation fails.

C. ALTERNATIVE RELIEF TO AMEND COMPLAINT

As alternative relief, should this court find the P&A's Amended Complaint deficient, this court should allow the P&A to amend to again include more names of others that have gone without community services based on the Defendant's conduct.

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized

> allegations of fact deemed supportive of [the] plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

Warth, 422 U.S. at 501–02 (citation omitted)

Other courts that are not bound to *Stincer* have also held the P&A should be allowed to amend. In the case of *Pennsylvania Prot. & Advocacy, Inc. v. Houston*, the individual plaintiffs seeking community services had been mooted out by the Defendants' post-litigation provision of the sought-after services. 136 F. Supp. 2d 353, 365 (E.D. Pa. 2001). The court, however, relied on *Stincer* to say the P&A had to identify how a specific individual was injured in order to have standing. *Houston*, 136 F. Supp. 2d at 365. However, the Eleventh Circuit merely held only that the injury to the constituents was not proven by the original affidavit. *Stincer*, 175 F. 3d at 887. Thus, *Stincer*'s decision had more to do with the insufficiency of proof in the plaintiff's motion for summary judgment of a concrete injury, rather than a pleading requirement to name names.

More importantly however, is the contradictory precipice the Pennsylvania's case places between the P&A and its constituents. On one hand, the statute mandates the P&A to advocate for and vindicate the rights of those persons with disabilities it was meant to protect including through the use of litigation. On the other hand, if read too narrowly, the Pennsylvania court purports to place the zealous advocacy of the individual plaintiffs at odds with the P&A's mandate. If the P&A were to name individuals who subsequently at the eleventh hour, as in this case, were offered services to relieve their situations, the P&A would be placed in the position of counseling between what is in the best interest of

the named individuals and fulfilling its mandated obligation to vindicate the rights of all the persons it was charged with protecting. Nothing in the doctrines of associational standing or the P&A's grant of authority mandates the P&A to utilize its members as martyrs and therefore its holdings should not be applied to the instant matter. Moreover, the Eleventh Circuit Court of Appeals has never, nor has any Florida case, cited *Houston*.

Nevertheless, should this Court rule in favor of Defendant's motion, the P&A should be given the opportunity to amend their pleading to add constituents that have not been mooted out by the Defendants. "It may be that Plaintiff can now identify a specific constituent who has suffered a concrete and particularized injury. If so, Plaintiff may move to amend its complaint to include this constituent." *Houston*, 136 F. Supp. 2d at 368. The Eleventh Circuit panel in *Stincer* noted that the P&A "may well be able to establish its standing to sue in this case." *Id.*, 175 F. 3d at 888. The *Stincer* court allowed the P&A to amend, which it did, and standing was subsequently met.

CONCLUSION

For the reasons contained herein, this Court should deny the Defendants' motion to dismiss. Should the court grant the Defendants' motion, however, the P&A should be given an opportunity to amend its complaint.

Respectfully submitted this 26th day of June, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Plaintiff's Response to the Defendants' Motion to Dismiss was furnished by CM/ECF to all attorneys of record this 26th day of June 2012.

By s/ Amanda Heystek
Amanda Heystek, Esquire